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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE CITY OF CATHEDRAL CITY;
JACK R. SMITH,
Petitioners,
vs.
PAUL R. HOESTEREY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the statute of limitations for a violation of 42 U.S.C. § 1983, arising out of a denial of procedural due process in the termination of public employment, commence at the time the employee learns that employment has been terminated, or on the last date of employment?

PARTIES TO THE PROCEEDING

All parties are listed in the caption to this Petition.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

LIST OF APPENDICES v

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION OF THIS COURT 2

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

INTRODUCTION 5

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT. 7

A. Under *Ricks* and *Chardon*, a limitations period is triggered when the act complained of occurs, not when its effects are felt. 8

B. The Ninth Circuit erred in its application of *Ricks* and *Chardon* here. 9

1. Ricks rejected speculative occurrences as a basis for extending a limitations period. 10

2. Hoesterey's own Complaint makes clear that there was no doubt in his mind that the decision to terminate him without due process was final. 11

II. THE DECISION OF THE COURT OF APPEALS CREATES A SPLIT OF AUTHORITY AMONG CIRCUIT COURTS OF APPEALS. 12

A. The Ninth Circuit's decision directly conflicts with decisions by the Courts of Appeals for the First and Sixth Circuits. 13

B. The Ninth Circuit's decision directly conflicts with analogous decisions by the Courts of Appeals for the Second and Fourth Circuits. 16

III. THIS COURT MUST EXERCISE ITS POWER OF SUPERVISION BY ISSUING A WRIT OF CERTIORARI TO PREVENT A MANIFEST INJUSTICE. . . . 20

CONCLUSION 21

LIST OF APPENDICES

Page

APPENDIX A

OPINION, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED SEPTEMBER 27, 1991 ..... A-1

APPENDIX B

ORDER DENYING REHEARING, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 2, 1991 ..... B-1

APPENDIX C

ORDER ON REMAND FROM NINTH CIRCUIT, UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, ENTERED DECEMBER 13, 1989. ..... C-1

APPENDIX D

ORDER REMANDING CASE TO DISTRICT COURT, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JULY 14, 1989 ..... D-1

APPENDIX E

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FEDERAL CLAIMS AND REMANDING THE CALIFORNIA CONSTITUTIONAL CLAIMS TO THE RIVERSIDE SUPERIOR COURT. UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, ENTERED MARCH 28, 1988 ..... E-1

APPENDIX F

EXCERPTS FROM COMPLAINT AND EXHIBIT B OF COMPLAINT, SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF RIVERSIDE, FILED NOVEMBER 30, 1987 ..... F-1

TABLE OF AUTHORITIES

Page

Cases

Abramson v. University of Hawaii
594 F.2d 202, (9th Cir. 1979) 8, 9

Arnett v. Kennedy
416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) 11

Aronsen v. Crown Zellerbach
662 F.2d 584, (9th Cir. 1981) 9

Baumann v. Arizona Dept. of Corrections
754 F.2d 841, (9th Cir. 1985) 9

Chardon v. Fernandez
454 U.S. 6, 102 S.Ct. 28
70 L.Ed.2d 6 (1981) . . . 6, 7, 8, 9, 11, 12, 14, 16, 18

Daniels v. Fesco Division of Cities Service Company
733 F.2d 622, (9th Cir. 1984) 9

Delaware State College v. Ricks
449 U.S. 250, 101 S.Ct. 498
66 L.Ed.2d 431 (1981) 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18

English v. Whitfield
858 F.2d 957 (4th Cir. 1988) 6, 18

Garland v. Shapiro
579 F.Supp. 858 (E.D. Mich., 1984) 6, 15, 16

Gibson v. United States
781 F.2d 1334, (9th Cir. 1986),
cert. denied 479 U.S. 1054 (1987) 7

Hoesterey v. City of Cathedral City et al.
945 F.2d 317 (9th Cir. 1991) 1, 9, 12

Hoesterey v. City of Cathedral City et al.
Case No. CV-87-8672-RSWL 1, 2

Hoesterey v. City of Cathedral City et al.,
Case No 88-5975 2

Holden v. Commission Against Discrimination
671 F.2d 30 (1st Cir. 1982),
cert. denied 459 U.S. 843, 103 S.Ct. 97
74 L.Ed.2d 88 (1982) 6, 13, 14 16, 17

Johnson v. Railway Express Agency, Inc.
421 U.S. 454, 95 S.Ct. 1716,
44 L.Ed.2d 295 (1975) 19

Kessler v. Board of Regents
738 F.2d 751 (6th Cir. 1984) 6, 14, 15, 16, 17

Naton v. Bank of California
649 F.2d 691 (9th Cir. 1981) 9

Pauk v. Board of Trustees of the
City University of New York
654 F.2d 856 (2nd Cir. 1981)
cert. denied 455 U.S.1000, 102 S.Ct. 1631
71 L.Ed.2d 866 (1987) 6, 17, 18

Ricks v. Delaware State College
605 F.2d 710, (3rd Cir. 1979) 10

Scott v. Pacific Maritime Ass'n
695 F.2d 1199, (9th Cir. 1983) 9

Skelly v. State Personnel Board
15 Cal.3d 194, 124 Cal.Rptr. 14 (1975) 11

United Air Lines, Inc. v. Evans
431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977) 19

Vasina v. Grumman Corp.
644 F.2d 112 (2nd Cir. 1981) 9

Ward v. Caulk
650 F.2d 1144, (9th Cir. 1981) 9

Wilson v. Garcia
471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) 7

Federal Statutes

28 U.S.C. § 1441 4
28 U.S.C. § 1441(a)(b)(c) 2
28 U.S.C. § 1254(1) 2
42 U.S.C. § 1981 8
42 U.S.C. § 1983 ..... i, 2, 3, 7, 8, 9, 12, 13, 14, 17
42 U.S.C. § 1985 13
42 U.S.C. § 1988 13
42 U.S.C. § 2000e 8
42 U.S.C. § 5851 18

State Statutes

California Code of Civil Procedure § 340 ..... 3, 7

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

THE CITY OF CATHEDRAL CITY; JACK R. SMITH,

Petitioners,

vs.

PAUL R. HOESTEREY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

The City of Cathedral City and Jack R. Smith, Defendants below, and Petitioners/Defendants here, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this matter.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit in this matter is reported at *Hoesterey v. City of Cathedral City et al.*, 945 F.2d 317 (9th Cir. 1991). (Appendix "A"). The Order by the United States District Court for the Central District of California, on Petitioners'/Defendants' Motion to Dismiss, *Hoesterey v. City of Cathedral City et al.*, Case No. CV-87-8672-RSWL, was filed on December 11, 1989. (Appendix "C"). It is

unreported. The Order by the Ninth Circuit Court of Appeals on Respondent's/Plaintiff's first appeal, *Hoesterey v. City of Cathedral City et al.*, Case No 88-5975, was filed on July 14, 1989. (Appendix "D"). It is unreported. The Order Granting Defendants' Motion to Dismiss Plaintiff's Federal Claims and Remanding the California Constitutional Claims to the Riverside Superior Court by the United States District Court for the Central District of California, *Hoesterey v. City of Cathedral City et al.*, Case No. CV 87-8672-RSWL (Bx) was filed on March 25, 1988, and entered on March 28, 1988. (Appendix "E"). It is unreported.

JURISDICTION OF THIS COURT

The opinion of the Court of Appeals for the Ninth Circuit was filed on September 27, 1991. By order filed December 2, 1991, that court denied the petition for rehearing (Appendix "B"), and this Petition is timely filed thereafter, pursuant to Rule 13.4 of the Rules of this Court, and the Federal Rules of Civil Procedure.

This Court has jurisdiction of this matter on a petition for writ of certiorari pursuant to 28 U.S.C. § 1254(1).

Respondent/Plaintiff filed his Complaint in state court, but included a claim for relief under 42 U.S.C. § 1983 for alleged deprivation of a property interest without due process. Petitioners/Defendants removed the action to the district court pursuant to 28 U.S.C. § 1441(a), (b), and (c) authorizing original jurisdiction of civil actions based on a claim arising under the United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Title 42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

California Code of Civil Procedure § 340 provides that certain actions shall be commenced within one year, and includes in pertinent part as follows:

> An action for . . . injury to or for the death of one caused by the wrongful act or neglect of another . . . .

STATEMENT OF THE CASE

The original Complaint in this matter was filed in state court on November 30, 1987. It alleges that Petitioners/Defendants City violated various due process and equal protection rights of Respondent/Plaintiff Hoesterey. Hoesterey alleged that City deprived him of a property

interest in his employment by summarily terminating him, without furnishing him with written notice of the proposed decision to terminate him or with written charges constituting "cause" for discharge, and without affording him an opportunity to respond to such charges *prior to* the discharge decision becoming final. Complaint, paragraphs 1, 17, 27, 28, 34, 36. (Appendix "F"). Specifically, the Complaint alleged that City gave Hoesterey notice in October, 1986, that his employment would terminate effective November 30, 1986. Complaint, paragraph 17. The Complaint further alleges that pursuant to a "Severance Agreement" executed by Respondent/Plaintiff on November 28, 1986, Hoesterey agreed that he was told in October, 1986, that his employment would end by the end of November, 1986, and further agreed that his employment terminated on November 30, 1986. Complaint, Exhibit B. (Appendix "F").

Petitioners/Defendants removed the matter to federal court pursuant to 28 U.S.C. § 1441, and thereafter moved to dismiss on the grounds that the case was barred by the applicable one year statute of limitations. The trial court granted the motion, and judgment was entered on March 28, 1988. Respondent/Plaintiff appealed; the matter was remanded by the United States Court of Appeals for the Ninth Circuit in an unpublished order dated July 14, 1989, which provided:

> Appellant alleged in his complaint that he had been denied procedural due process by the appellees. He claims that as a nonprobationary employee, he was entitled to a pretermination hearing. Apparently, such a hearing could take place anytime prior to the date when appellant was actually discharged. However, the district court did not

> consider whether the statute of limitations began to run when appellant was notified that he was to be discharged or when appellees failed to provide a hearing. Accordingly, we remand the case to the district court for consideration of this issue. (Appendix "D").

On remand, the trial court considered three possible dates when the limitations period could have commenced: in October, 1986, when Hoesterey was notified that his employment would end; or on November 28, 1986, when Hoesterey signed the "Severance Agreement"; or on November 30, 1986, when he actually ended his employment. After consideration of all the facts alleged in the Complaint, the district court concluded that the statute of limitations began to run in October, 1986, when Hoesterey was notified that his employment was at an end. Order, CV 87-8672-RSWL, filed December 11, 1989.

Respondent/Plaintiff again appealed to the Court of Appeals for the Ninth Circuit, which on September 27, 1991, rendered its decision reversing the district court and remanding the matter. Petitioners/Defendants immediately sought a rehearing on the matter, which was denied on December 2, 1991.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

There are three compelling reasons why this Court should take the extraordinary step here of granting its writ of certiorari.

First, the decision of the Court of Appeals is in direct conflict with the directly applicable, clear and well-established interpretations of this Court, enunciated in *Delaware State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980), and *Chardon v. Fernandez*, 454 U.S. 6, 102 S.Ct. 28, 70 L.Ed.2d 6 (1981).

Second, the decision of the Court of Appeals creates a split of authority among the circuits. Specifically, the decision of the Court of Appeals is directly at variance with the decision of the Court of Appeals for the First Circuit in *Holden v. Commission Against Discrimination*, 671 F.2d 30 (1st Cir. 1982), a case in which this Court *denied* a writ of certiorari, 459 U.S. 843, 103 S.Ct. 97, 74 L.Ed.2d 88 (1982); it is directly at variance with the decision of the Court of Appeals for the Sixth Circuit in *Kessler v. Board of Regents*, 738 F.2d 751 (6th Cir. 1984); and it is directly at variance with an application of this Court's decision in *Delaware State College v. Ricks*, *supra*, by the United States District Court for the Eastern District of Michigan, in *Garland v. Shapiro*, 579 F.Supp. 858 (1984), the holding of which has not been disturbed by the Court of Appeals for the Sixth Circuit. Further, the decision of the Court of Appeals is at variance with the analogous decision of the Court of Appeals for the Second Circuit in *Pauk v. Board of Trustees of the City University of New York*, 654 F.2d 856 (1981), *cert. denied* 455 U.S. 1000, 102 S.Ct. 1631, 71 L.Ed.2d 866 (1982); and with the analogous decision of the Court of Appeals for the Fourth Circuit in *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988).

Third, the decision of the Court of Appeals is so completely at variance with clear facts on the face of the Complaint that the supervision of this Court is necessary to prevent a miscarriage of justice.

If allowed to stand, the Ninth Circuit's decision will extend a limitations period beyond the time an employee is given notice of termination, and beyond the time an employee should know of any due process violation involved. It would go beyond this Court's conclusion that a statute of limitations should accrue when an injury occurs, not when its effects are felt. This Court must issue a writ to correct this error.

I.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The Ninth Circuit correctly recognized that it was required to refer to California law to determine the length of the statute of limitations period applicable to a claim, pursuant to 42 U.S.C. § 1983, of a violation of pretermination procedural due process. *Wilson v. Garcia*, 471 U.S. 261, 266, 105 S.Ct. 1938, 1941, 85 L.Ed.2d 254 (1985). Such a statute of limitations in this case would be one year. California Code of Civil Procedure § 340. However, the Court of Appeals held itself bound by federal law to determine the point at which the limitations period begins to run. *Gibson v. United States*, 781 F.2d 1334, 1337 (9th Cir. 1986), *cert. denied* 479 U.S. 1054 (1987). The Court of Appeals also correctly determined that it should look for guidance to this Court's decisions in *Delaware State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1981) (hereafter "*Ricks*"), and *Chardon v. Fernandez*, 454 U.S. 6, 102 S.Ct. 28, 70 L.Ed.2d 6 (1981) (hereafter "*Chardon*"). However, thereafter the Court of Appeals went awry in its analysis, and exercise of this Court's jurisdiction on certiorari will be necessary to correct the error. Rule 10.1(c), Supreme Court Rules.

A. Under *Ricks* and *Chardon*, a limitations period is triggered when the act complained of occurs, not when its effects are felt.

In *Ricks* and *Chardon*, this Court addressed the question of when a limitations period for various civil rights violations begins to run. *Ricks* involved a plaintiff college professor who was denied tenure, but offered a one year "terminal contract" which he accepted. He argued that his causes of action under Title VII (42 U.S.C. § 2000e) and 42 U.S.C. § 1981 for discrimination based on national origin began to run at the end of the terminal contract, not at the time he was notified that he would not receive tenure. *Chardon* involved plaintiff nontenured administrators who were each notified in advance of their termination dates that they would be terminated from their employment. They argued that their causes of action under 42 U.S.C. § 1983 for violation of First Amendment rights began to run on the date of termination, not on the date they received notice of their termination.

In both cases, this Court rejected the plaintiffs' arguments. The Court concluded that the limitations periods began to run when the specific act complained of by plaintiff occurred, not when the effects of that act were felt. In *Ricks*, the discriminatory animus alleged to motivate defendants occurred when the decision to deny tenure became final, not on the last day of employment; in *Chardon*, the political animus alleged to motivate defendants occurred when notice of termination was given, not on the last day of employment. Quoting a Ninth Circuit decision, the Court pointed out that "'the proper focus is upon the time of the *discriminatory* acts, not upon the time at which the *consequences* of the acts became most painful.' *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979) (emphasis added)."

B. The Ninth Circuit erred in its application of *Ricks* and *Chardon* here.

In this case, the Ninth Circuit grappled for the first time with the application of the principles enunciated in *Ricks* and *Chardon* to an allegation of a denial of due process rights under 42 U.S.C. § 1983.[1/] As directed by this Court in *Ricks*, the Ninth Circuit addressed itself to the task of "identifying precisely 'the unlawful employment practice'" at issue here. *Hoesterey v. City of Cathedral City et al.*, 945 F.2d at 319, quoting *Ricks*, 449 U.S. at 257. The court correctly identified the unlawful employment practice of which Hoesterey complains as the lack of procedural due process accompanying the decision to terminate his employment, not the decision itself.

It was at this point that the Ninth Circuit committed its error. It persuaded itself that some procedural due process might have been afforded Hoesterey at some time between the date he alleged he was notified of the decision to terminate him, i.e., October, 1986, and the final date of his employment, i.e., November 30, 1986. Thus, the *decision* to terminate him without due process could not have occurred before November 30, 1986, nor could he have known of that decision. The court relied on

[1/] Despite the genesis of this Court's rulings in *Ricks* and *Chardon* in the Ninth Circuit's ruling in *Abramson v. University of Hawaii, supra*, the Ninth Circuit has had, compared with the Courts of Appeals in other circuits, surprisingly few opportunities to apply *Ricks* and *Chardon*. See, *Vasina v. Grumman Corp.*, 644 F.2d 112, 120 (2nd Cir. 1981); *Naton v. Bank of California*, 649 F.2d 691, 695 (9th Cir. 1981); *Ward v. Caulk*, 650 F.2d 1144, 1147, (9th Cir. 1981); *Aronsen v. Crown Zellerbach*, 662 F.2d 584, 592-3 (9th Cir. 1981); *Scott v. Pacific Maritime Ass'n*, 695 F.2d 1199, 1205 (9th Cir. 1983); *Daniels v. Fesco Division of Cities Service Company*, 733 F.2d 622, 623 (9th Cir. 1984); *Baumann v. Arizona Dept. of Corrections*, 754 F.2d 841, 844 (9th Cir. 1985).

no authority whatsoever for such a distinction. Moreover, neither this Court's analysis in *Ricks* nor the complaint that framed the issues in this case permit this conclusion.

1. *Ricks* rejected speculative occurrences as a basis for extending a limitations period.

The Ninth Circuit rested its entire analysis on a perception that unless Hoesterey received specific notice both that he would be terminated on November 30, 1986, and that no further due process would be afforded to him, Hoesterey might have labored under the impression between October, 1986, and November 30, 1986, that some process would be forthcoming. But this speculation about what might have been done to cure the injury before the end of employment was rejected by this Court in *Ricks*.

As this Court noted in its decision (449 U.S. at 256), the Court of Appeals for the Third Circuit based its decision that the limitations period in *Ricks* did not begin to run until the end of the plaintiff's "terminal contract" on a belief that the initial decision to terminate an employee sometimes might be reversed. *Ricks v. Delaware State College*, 605 F.2d 710, 712 (3rd Cir. 1979). In reversing the Third Circuit, this Court rejected that speculative basis for delaying the accrual of a cause of action. It was correct to do so. In *Ricks*, and in this case, it is clear from the pleaded facts that the alleged unlawful employment practice took place at the point in time specified in the complaint, and was not cured before the final date of employment. Hence the cause of action must necessarily accrue on the earlier date.

2. Hoesterey's own Complaint makes clear that there was no doubt in his mind that the decision to terminate him without due process was final.

It is the Complaint itself, not any demonstrated facts, that frames the issues before the Court, since this matter proceeded before the trial court on a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Even if the Ninth Circuit had correctly applied this Court's formulation of the test for accrual of a cause of action under *Ricks* and *Chardon*, the Complaint in this case satisfies the test devised by the Ninth Circuit.

Paragraph 15 of the Complaint alleges that Hoesterey was told as early at January, 1985, that he would be discharged without any opportunity to respond to charges, since the only reason for the discharge was that it was time for him "to spread [his] wings and fly for the good of [his] career."

Paragraph 17 of the Complaint alleges very specifically that he was told in October, 1986, that he could not work beyond November 30, 1986. There could hardly be a more specific notice to him that the decision was final, and that nothing more would be done for him or heard from him, and that he would not be given an opportunity to sway the decision-making authority, *cf. Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); *Skelly v. State Personnel Board*, 15 Cal.3d 194, 124 Cal.Rptr. 14 (1975).

Paragraph 18 of the Complaint alleges that throughout November, 1986, but before November 30, 1986, Hoesterey requested "proper written notice of termina-

tion" and that each time it was denied him. Again, he could not have mistaken the City's intention to provide him with no more process than the notice given in October.

Paragraph 19 of the Complaint details Hoesterey's efforts to extract from the City a severance agreement, and the City's resistance to his demands. These allegations clearly describe an intent to provide no further process than already afforded. Paragraph 19 also alleges that a severance agreement was finally executed on November 28, 1986, whereby Hoesterey resigned; at that point, the City was obviously not going to give him any further due process.

Each of the foregoing paragraphs of the Complaint describes events occurring more than one year prior to the date the Complaint was filed. Each constitutes overwhelming notice to Hoesterey that the decision to terminate him "was final and that it would be followed by no further process" (945 F.2d at 320). Even if the Ninth Circuit's articulation of this Court's rulings in *Ricks* and *Chardon* were correct, the Complaint was barred.

II.

THE DECISION OF THE COURT OF APPEALS CREATES A SPLIT OF AUTHORITY AMONG CIRCUIT COURTS OF APPEALS.

The Ninth Circuit had not previously addressed the accrual of a limitations period on a claim of denial of procedural due process under 42 U.S.C. § 1983. However, the question, or substantially similar questions, have come up before other Courts of Appeals, which have ruled differently than the Ninth Circuit did here.

Such a split of authority is a compelling basis for the exercise of jurisdiction by this Court. Rule 10.1(b), Supreme Court Rules. This is especially so where, as here, the issue concerns something so fundamental to the parties to litigation as accrual of a limitations period. Significant problems of equity, implicating even equal protection interests, will result if the same cause of action may accrue at different times to different plaintiffs or against different defendants, depending on where the alleged injury occurs, or upon where a party may reside. Both potential plaintiffs and potential defendants have an interest in this Court resolving these conflicts.

A. The Ninth Circuit's decision directly conflicts with decisions by the Courts of Appeals for the First and Sixth Circuits.

The first case which differs from the Ninth Circuit's analysis here is *Holden v. Commission Against Discrimination*, 671 F.2d 30 (1st Cir. 1982), *cert. denied* 459 U.S. 843, 103 S.Ct. 97, 74 L.Ed.2d 88 (1982). In *Holden*, the plaintiff, a black woman, was dismissed from her position as public information officer. She received notice that she would be discharged on May 3, 1973. Her termination was effective on August 31, 1973. She filed a complaint with Equal Employment Opportunity Commission, alleging violations of Title VII of the Civil Rights Act of 1964, and subsequently received a right to sue letter. She filed her suit on November 28, 1973, and later was granted permission to amend it to add claims under 42 U.S.C. §§ 1983, 1985 and 1988, which included allegations that due process rights had been violated. The district court granted summary judgment for the defendants on these claims, finding that the six month statute of limitations applicable to all of them under Massachusetts law,

including the due process claims, began to run on May 3. The Court of Appeals for the First Circuit agreed. Relying specifically on *Ricks* and *Chardon*, the court found that the statute of limitations on all the Civil Rights Act causes of action, including the due process claim, commenced on May 3, the date Holden learned of the decision to dismiss her.

There is no meaningful distinction between the facts in *Holden* and the facts here, but the Ninth Circuit made no attempt to distinguish *Holden*, even though it was called to the court's attention. In both cases, a plaintiff alleged that notice of termination of employment violated due process rights under 42 U.S.C. § 1983, but tried to argue that the cause of action did not accrue until the actual termination occurred. In both cases the result should have been the same, and through the correct application of this Court's decisions in *Ricks* and *Chardon* it would have been. This Court must now correct the inequities created by this deliberate split of authority.

The First Circuit is not alone in its understanding of the application of *Ricks* and *Chardon*. The Court of Appeals for the Sixth Circuit reached the same conclusion in *Kessler v. Board of Regents*, 738 F.2d 751 (6th Cir. 1984). Kessler was employed by the University of Tennessee. She was notified that she was terminated from that employment by the Chancellor on August 29, 1980. On June 30, 1981, the Board of Regents notified her that it found no basis to reverse the decision of the Chancellor. That conclusion was confirmed by letter to Kessler from the Governor on December 14, 1981. Kessler filed her lawsuit on August 30, 1982, alleging, among other things, deprivation of due process rights in that she was never afforded a posttermination hearing. The district court dismissed the case based on the one year statute of

limitations, and the Court of Appeals agreed. It rejected Kessler's argument that her cause of action accrued on December 14, 1981. Although the June 30, 1981, letter from the Board did not specifically indicate whether the Board intended to consider the matter further, the court concluded that it was precise enough to trigger Kessler's due process cause of action. It based its conclusion squarely on *Ricks*.

Once again there is no meaningful distinction between the facts before the Sixth Circuit in *Kessler*, and the facts that were before the Ninth Circuit here. The Ninth Circuit was much concerned about its own speculation that between October, 1986, and November 30, 1986, the Petitioners/Defendants City might have cured the deprivation of pretermination due process. But confronted with that precise possibility in the ambiguities of the June 30 letter from the Board to Kessler, the Sixth Circuit did not hesitate to conclude that her cause of action accrued on June 30, 1981, rather than December 14, 1981. Since "the Board gave no indication that it would give any further consideration to Kessler's complaints" (738 F.2d at 755), her cause of action was found to have accrued at the earlier date. Similarly here, the Complaint indicates that the City gave no indication that it would give any further consideration to Hoesterey's arguments (Complaint, paragraphs 17 - 20).

The conflict between the Sixth Circuit's view on these issues and the Ninth Circuit's result here is highlighted by the published district court decision in *Garland v. Shapiro*, 579 F. Supp. 858 (E.D. Mich., 1984). In that case, the district court rejected precisely the argument which persuaded the Ninth Circuit in this case, and the district court's analysis has never been questioned or disapproved by the Sixth Circuit.

Plaintiff Garland was notified on April 9, 1980, by his immediate supervisor at the University of Michigan, that his employment was being terminated effective June 30, 1980. Garland was never given a written statement of the reasons for his termination. He filed his action alleging deprivation of his job without due process of law on June 30, 1983. Under the applicable three year statute of limitations, the district court found that his lawsuit was barred. Like Hoesterey here, Garland argued that his cause of action for deprivation of due process did not accrue until June 30, 1980, since at any time prior to that date, the deprivation could have been cured. The district court rejected his argument, finding that the actual decision to deny Garland due process was made at the time of initial April 9 notice, and that Garland knew or should have known this to be the case.

Garland is so similar to this case as to be practically indistinguishable; like *Holden v. Commission Against Discrimination, supra*, it was called to the attention of the Ninth Circuit as a published opinion by a federal court. Yet a different result obtained. It is certain that, in light of *Kessler v. Board of Regents*, decided at almost the same time, the Sixth Circuit would have affirmed the district court. Clearly there is a significant split between the Sixth Circuit and the Ninth Circuit on this issue.

B. The Ninth Circuit's decision directly conflicts with analogous decisions by the Courts of Appeals for the Second and Fourth Circuits.

Both the Court of Appeals for the Second Circuit and the Court of Appeals for the Fourth Circuit have applied *Ricks* and *Chardon* to facts which, while not involving allegations of a deprivation of due process, suggest that

they would agree with the First Circuit in *Holden v. Commission Against Discrimination, supra*, and with the Sixth Circuit in *Kessler v. Board of Regents, supra*, rather than with the Ninth Circuit here.

In *Pauk v. Board of Trustees of City University of New York*, 654 F.2d 856 (2nd Cir. 1981), *cert. denied* 455 U.S. 1000, 102 S.Ct. 1631, 71 L.Ed.2d 866 (1987), the Second Circuit addressed claims of retaliation for the exercise of First Amendment rights by an assistant professor at Queens College of the City University of New York. Plaintiff Pauk was notified on October 24, 1975, by the President of the College that the College Personnel and Budget Committee had voted against granting him a reappointment with tenure. Pauk appealed. On November 14, 1975, the President denied his appeal, and Pauk was notified on November 24, 1975, that his employment would terminate on August 31, 1976. He filed his lawsuit on August 31, 1979. His cause of action under 42 U.S.C. § 1983 was dismissed by the district court as barred by a three year statute of limitations. Pauk argued that his cause of action did not accrue until August 31, 1976, because between November 24, 1975, and August 31, 1976, the decision to terminate him was not final, and the Board of Trustees of the University could have acted to reverse the President. The Court of Appeals rejected his argument, because under New York law no action by the Board was required, Pauk having withdrawn a grievance that might have led to Board review.

These facts are sufficiently analogous to the case here to provide some sense how the Second Circuit would have viewed Hoesterey's claim. *Ricks* requires an examination of the allegations by the Plaintiff to determine precisely the unlawful employment practice at issue; in *Pauk*, as in *Ricks*, the issue was a denial of tenure, whereas here it is

a denial of due process. In each case, the injury occurred when the Plaintiff received notice that his employment would terminate on a particular date. In *Pauk*, as in *Ricks*, the court refused to speculate on what *might* have occurred, but subsequently did *not* occur, between the date the notice was given and the final date of employment. The Ninth Circuit's willingness to so speculate places it in conflict with the Second Circuit.

The Court of Appeals for the Fourth Circuit has also suggested that it would not follow the reasoning of the Ninth Circuit. In *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988), the Fourth Circuit was confronted by a claim of employment-related discrimination under the Employee Protection Section of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851. As a result of a dispute over radioactive contamination in her work place, discipline was initiated against Plaintiff English on March 15, 1984. English appealed the disciplinary action. On May 15, 1984, she was notified that she was being temporarily reassigned until July 30, 1984, and that if she had not found a suitable permanent position elsewhere in her employer's facility, she would be laid off. No permanent position was ever found, and her last day of work was July 30. Under the applicable federal regulations, she was required to file a complaint alleging discrimination in employment with the Department of Labor within thirty days of the action complained off; she filed her complaint on August 24, 1984. However, it was dismissed by the Administrative Law Judge as untimely, since her cause of action accrued on May 15, 1984. The Court of Appeals, on a petition for review, agreed. Applying *Ricks* and *Chardon*, the court rejected English's argument that the May 15 decision was not "final and unequivocal." English argued that the May 15 letter was insufficient to trigger a limitations period, because her termination depended on

facts which would not be known until the last day of her temporary assignment. But the court disagreed, pointing out that the notice gave "no intimation in it that the decision was subject to further appeal, review, or revocation." (858 F.2d at 962).

In light of this analysis, the Fourth Circuit would almost certainly reject the reasoning of the Ninth Circuit here. Just as the notice provided to English gave no intimation that it was subject to further appeal, review, or revocation, so the notice alleged by Hoesterey in the Complaint gave no intimation that it was subject to further appeal, review or revocation. Thus the Ninth Circuit's speculations are inapposite; given what he was told, Hoesterey certainly had notice that the Petitioners/ Defendants City intended both to terminate him and to give him no further process. The Fourth Circuit and Ninth Circuit analyses are incurably in conflict.

As this Court has noted so frequently, limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past. *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 463-464, 95 S.Ct. 1716, 1721-1722, 44 L.Ed.2d 295 (1975). See also, *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558, 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977). The Ninth Circuit's decision would extend the limitations period of a claim beyond the time when an employee is notified of termination. It would base the commencement of that period on the date of implementation of a decision previously made and communicated by the employer. Such a result would not serve the policy of protecting employers described above.

An employer's vulnerability to challenge for its employment decision should not depend on which circuit of the federal courts it is in when it implements that decision. Both plaintiffs and defendants need a uniform rule for the accrual of a limitations period over issues as important as procedural due process in the implementation of employment decisions. This Court must grant this Petition for Certiorari to resolve the conflict among the circuits created by the Ninth Circuit's decision here.

III.

THIS COURT MUST EXERCISE ITS POWER OF SUPERVISION BY ISSUING A WRIT OF CERTIORARI TO PREVENT A MANIFEST INJUSTICE.

Rule 10.1(a) of this Court's Rules suggests that one of the rare instances when this Court will exercise its jurisdiction on a writ of certiorari is when a lower court has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. This is such a case.

As discussed at some length in Section I above, the Complaint in this matter contains on its face facts which compel the conclusion that Respondent/Plaintiff Hoesterey was fully aware in October, 1986, that the Petitioners/Defendants City intended his employment to terminate on November 30, 1986, and had no intention of affording him any other due process. Complaint, paragraphs 15, 17, 18, 19. But it appears that these allegations in the Complaint, and facts contained in Exhibit B to the Complaint, were simply overlooked by the Court of Appeals.

The allegations on the face of the Complaint clearly show that Respondent/Plaintiff Hoesterey received unequivocal notice in October, 1986, that his employment with Petitioners/Defendants City was terminated, and that his last day of employment would be November 30, 1986. There is no suggestion in the Complaint that Respondent/Plaintiff was given notice that the Petitioners/Defendants merely proposed to terminate him, or viewed the decision as in any way tentative. Respondent/Plaintiff knew in October, 1986, that he had not received notice of the proposed action accompanied by reasons therefor, nor had he been offered an opportunity to respond. The signed written Agreement, attached to the Complaint as Exhibit B, demonstrates that Respondent/Plaintiff understood on November 28, 1986, that in early October, he had been unequivocally terminated, with only the implementation date delayed to November 30, 1986.

All these allegations were erroneously interpreted by the Court of Appeals. Unless this Court exercises its jurisdiction on this Petition for Certiorari, the Court of Appeals' clearly erroneous interpretations of these alleged facts will become the law of the case, and control the further proceedings in this matter. This Court should exercise its jurisdiction here to prevent this injustice.

CONCLUSION

Petitioners/Defendants are mindful that this Court exercises its jurisdiction on a petition for certiorari only with great restraint, and they do not seek this Court's attention lightly. However, this published decision by the Court of Appeals for the Ninth Circuit is so clearly at variance with the decisions of this Court itself, and with decisions of other Courts of Appeals, that unless it is corrected by this Court, it will create confusion and

conflict for parties in all jurisdictions served by the Ninth Circuit. The accrual of a limitations period is a fundamental question critical to the outcome of any lawsuit. This Court must correct the error done by the Ninth Circuit here.

Dated: February 25, 1992

Respectfully submitted,

JOHN LIEBERT
Counsel of Record

LARRY J. FRIERSON

MARY L. DOWELL

DEBRA L. BRAY

Attorneys for
Petitioners
CITY OF CATHEDRAL
CITY, JACK R. SMITH

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAUL R. HOESTEREY, *Plaintiff-Appellant,* v. THE CITY OF CATHEDRAL CITY; JACK R. SMITH, *Defendants-Appellees.*	No. 90-55141 D.C. No. CV-87-8672-RSWL OPINION

Appeal from the United States District Court
for the Central District of California
Ronald S. W. Lew, District Judge, Presiding

Submitted June 5, 1991*
Pasadena, California

Filed September 27, 1991

Before: Betty B. Fletcher and William C. Canby, Jr., Circuit Judges, and Robert J. McNichols,** District Judge.

Opinion by Judge Fletcher

*The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

**Honorable Robert J. McNichols, Chief United States District Judge for the Eastern District of Washington, sitting by designation.

SUMMARY

Statutes of Limitation

Reversing a district court judgment dismissing a Section 1983 action as time-barred under the applicable statute of limitations, the court of appeals held that the district court erred in calculating the limitations period from the date that a city employee received notice of the decision to terminate his employment rather than from his last date of employment.

Appellant Paul R. Hoesterey was forced to resign from his position as Assistant City Manager of Cathedral City, a non-probationary position from which he could be discharged only for cause. The City Manager began to pressure Hoesterey to resign beginning in 1985. On November 28, 1986, because of coercion, intimidation, and threats that Hoesterey would receive unfavorable recommendations unless he resigned immediately, Hoesterey involuntarily resigned, effective the last day of the month. He ceased work on November 30, 1986. On November 30, 1987, Hoesterey filed a Section 1983 action in state court, asserting that his resignation was constructive termination, and that the City's failure to provide him with a pretermination hearing violated both the federal and state constitutions. After the City removed the action, the federal district court dismissed Hoesterey's Section 1983 claim as time-barred and remanded the remainder of his claims to state court. On a prior appeal, the appellate court determined that the one-year statute of limitations in Cal. Civ. P. Code governed Hoesterey's Section 1983 claim. The district court found its previous dismissal proper.

[1] The time at which the statute of limitations period commences on a Section 1983 claim for redress of a failure to grant a pretermination hearing was an issue of first impression in the Ninth Circuit. **[2]** However, two Supreme Court decisions regarding the accrual of the limitation period in employ-

ment discharge actions directed the court's inquiry to determine the point at which Hoesterey's claim began to accrue. [3] In determining which event commenced the running of the statute of limitations period, the Supreme Court directed that a court must first identify precisely the unlawful employment practice of which the plaintiff complains. [4] Unlike *Chardon* and *Ricks* in which the plaintiffs challenged the actual decision to terminate, here, the failure to provide the requisite procedure rather than the actual decision to terminate was at issue. Thus, the simple notification that he was being discharged at a later date was not sufficient to trigger the statute of limitations period. [5] Instead, to trigger the statute of limitations, Hoesterey needed to have received notice, not only of the termination decision, but also that the decision was final and that it would be followed by no further process. In the absence of such unequivocal notice, it would only be on the last day of employment that Hoesterey could become aware that the decision was final and that no further process could be forthcoming prior to termination. Accordingly, it would be only on this date that the statute of limitations period would begin to run. [6] Here, nothing in the complaint suggested that Hoesterey was informed or should otherwise have known that he would receive neither such notification nor a pretermination hearing. Only when Hoesterey's employment was actually terminated, on his last day of work, did he know that he would receive no written notice or pretermination hearing. Accordingly, the district court erred in dismissing Hoesterey's claim on statute of limitations grounds.

COUNSEL

Russell L. Davis, Palm Desert, California, for the plaintiff-appellant.

Larry J. Frierson, Liebert, Cassidy & Frierson, Los Angeles, California, for the defendants-appellees.

OPINION

FLETCHER, Circuit Judge:

Appellant Paul R. Hoesterey appeals the district court's dismissal of his action against the City of Cathedral City and its City Manager, Jack R. Smith (collectively, "the City"). Based on its determination that the statute of limitations' period had expired, the court below dismissed Hoesterey's claim seeking redress pursuant to 42 U.S.C. § 1983 for the alleged deprivation of his due process rights caused by the City's terminating his employment without a hearing. On appeal, Hoesterey asserts that the district court erred in calculating the statute of limitations period from the date that Hoesterey received notice of the decision to terminate his employment rather than from his last date of employment. We agree, and reverse.

BACKGROUND

According to the complaint filed in this action, Hoesterey held the position of Assistant City Manager of Cathedral City, a nonprobationary position from which he could be discharged only for cause. Beginning in January, 1985, Smith began to pressure Hoesterey to resign from his position. In October, 1986, Smith increased the pressure, insisting that Hoesterey leave by December 1 of that year. Smith allegedly secured his goal on November 28, 1986, when, because of coercion, intimidation, and threats that he would receive unfavorable recommendations unless he resigned immediately, Hoesterey involuntarily resigned, effective the last day of the month. He ceased work on November 30, 1986.

On November 30, 1987, Hoesterey filed suit in the Superior Court of the State of California. In his complaint, he asserted that his resignation constituted constructive termination, and that the City's failure to provide him with a pretermination hearing violated both the United States and the California constitutions. The City subsequently removed the action to

the district court pursuant to 28 U.S.C. § 1441. There, on motion of the City, the district court dismissed Hoesterey's section 1983 claim based on its determination that the relevant statute of limitations period had expired. It remanded the remainder of Hoesterey's claims to California state court.

On appeal from this dismissal, this circuit stated that the one-year statute of limitations established in section 340(3) of the California Civil Procedure Code governed Hoesterey's section 1983 claim. We noted that if the limitations period were calculated to run from Hoesterey's last day of employment, rather than from the date of notice of the discharge, the complaint would have been timely filed.[1] We therefore remanded the action for the district court to consider on which of these dates the statute of limitations should begin to run. On remand, the district court concluded that the limitations period properly began to run from the date of notification of the discharge. It based this decision on its determination that Hoesterey should have known on that date that he would receive no further review of the notification decision. The district court therefore found its previous dismissal to be proper. Hoesterey appeals this determination.[2]

DISCUSSION

We review *de novo* a district court's grant of a motion to dismiss based on the expiration of the relevant statute of limitations period. *Gibson v. United States*, 781 F.2d 1334, 1337

[1]Hoesterey's last day of employment was November 30, 1986. He filed suit on November 30, 1987. Because November 29, 1987 was a Sunday, the filing of the suit on Monday, November 30, 1987, would have been timely if the limitations period was triggered by his last day of employment.

[2]Hoesterey also argues that the statute of limitations period should be tolled on equitable grounds due to misrepresentations and threats made to him by Smith. Because we hold that the district judge improperly determined the commencement of the limitations period, we need not reach the issue of equitable estoppel.

(9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987). Our review is based on the contents of the complaint, the allegations of which we accept as true and construe in the light most favorable to the plaintiff. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). Dismissal is proper only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Gibson*, 781 F.2d at 1337 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

[1] The time at which the statute of limitations period commences on a section 1983 claim for redress of a failure to grant a pretermination hearing is an issue of first impression in this circuit. While we rely on state law to determine the length of the statute of limitations period applicable to such a section 1983 claim, *see Wilson v. Garcia*, 471 U.S. 261 (1985), the determination of the point at which the limitations period begins to run is governed solely by federal law. *Gibson*, 781 F.2d at 1340. Under federal law, the touchstone for determining the commencement of the limitations period is notice: "a cause of action generally accrues when a plaintiff knows or has reason to know of the injury which is the basis of his action." *Cline v. Brusett*, 661 F.2d 108, 110 (9th Cir. 1981).

[2] Two Supreme Court decisions regarding the accrual of the limitation period in employment discharge actions direct our inquiry to determine the point at which Hoesterey's claim began to accrue: *Delaware State College v. Ricks*, 449 U.S. 250 (1980), and *Chardon v. Fernandez*, 454 U.S. 6 (1981). In *Ricks*, plaintiff, a black Liberian, challenged his denial of tenure by the defendant college as discriminatory pursuant to title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e. On the date that Ricks was formally notified of the denial of tenure he was offered a "terminal" contract to teach an additional year in a non-tenured capacity. If the relevant statute of limitations period were deemed to commence on the expiration of the terminal contract, Ricks' suit would have been

timely filed; however, if that period were deemed to commence on notification of the denial of tenure, the suit would have been barred by the statute of limitations.

[3] In determining which event commenced the running of the statute of limitations period, the Supreme Court directed that a court must first "identify precisely the 'unlawful employment practice' of which [the plaintiff] complains." *Ricks,* 449 U.S. at 257. In Ricks' case, the Court stated, the challenged employment practice was the decision to deny tenure. According to the Court, because Ricks, on learning of the denial of tenure, would have notice of all the allegedly wrongful acts that he later sought to challenge, the statute of limitations must be deemed to commence at that time. *Id.* at 258. The Court rejected Ricks' contention that his actual termination should serve as the date his claim accrued because it was also motivated by discrimination and therefore constituted part of a continuing violation. According to the Court, the termination of Ricks' employment was not an independent discriminatory act, but merely the "delayed, but inevitable, consequence of the denial of tenure." *Id.* at 257-58. The Court directed that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Id.* at 257.

The Supreme Court extended *Ricks*' holding in *Chardon v. Fernandez,* 454 U.S. 6 (1981). In that case, administrators in the Puerto Rico Department of Education challenged the termination of their employment pursuant to section 1983 as politically motivated, in violation of their first amendment rights. The administrators were notified by letter of their impending termination on dates ranging from two weeks to two months prior to their last day of employment. On filing the action after termination, the employees contended that the statute of limitations period should begin to accrue on the date of their termination from employment, rather than the date on which they were notified of their impending termination.

On the basis of *Ricks*, the Supreme Court rejected their contention. Again, the Court's conclusion was based on the nature of the practice challenged by the plaintiffs as unlawful. The practice challenged in that case, according to the Court, was not the termination of employment, but the decision to terminate employment for political reasons. The Court therefore found *Ricks* indistinguishable from the first amendment claim before it because "in each case, the operative decision was made—and notice given—in advance of a designated date on which employment terminated." *Id.* at 8. Since the decision to terminate for unlawful reasons, not the termination, itself, was the basis for the challenge, the Court held that the statute accrued from the time the plaintiffs received notice of the decision.

[4] Applying the *Ricks/Chardon* analysis to the case at bar, we begin by "identify[ing] precisely 'the unlawful employment practice' " of which Hoesterey complains. *Ricks*, 449 U.S. at 257. Here, Hoesterey contends that the City unlawfully failed to provide him with a pretermination hearing regarding its decision to terminate his employment. Unlike *Chardon* and *Ricks* in which the plaintiffs challenged the actual decision to terminate, here, the failure to provide the requisite procedure rather than the actual decision to terminate is at issue. *Ricks*, 449 U.S. at 258. The different practices challenged in these cases necessarily affect the point in time at which the statute of limitations begins to accrue. *Accord Rubin v. O'Koren*, 644 F.2d 1023, 1026 (5th Cir. 1981) (Hill, J., concurring). Because Hoesterey contests the lack of process accompanying his termination, in contrast to *Ricks* and *Chardon*, simple oral notification of the decision to terminate him at a later time would not alert him to the specific practices challenged here: the fact that no more process would be forthcoming prior to termination. Thus, the simple notification that he was being discharged at a later date would not be sufficient to trigger the statute of limitations period. *Accord id.*

[5] Instead, to trigger the statute of limitations, Hoesterey needed to have received notice, not only of the termination decision, but also that the decision was final and that it would be followed by no further process. To alert Hoesterey to the accrual of his claims, this notice would need to be unequivocal, and communicated in a manner such that no reasonable person could think there might be a retreat or change in position prior to the termination of the employment decision. In the absence of such unequivocal notice, it would only be on the last day of employment that Hoesterey could become aware that the decision was final and that no further process could be forthcoming prior to termination. Accordingly, it would be only on this date that the statute of limitations period would begin to run.

[6] Here, construing the allegations of the complaint in the light most favorable to Hoesterey, we find insufficient indication that Hoesterey received notice that the termination decision was final and would be accompanied by no further process. On the contrary, the complaint asserts that Hoesterey repeatedly requested that Smith provide him the written notification of termination required for City employees to appeal a termination decision. Nothing in the complaint suggests that Hoesterey was informed or should otherwise have known that he would receive neither such notification nor a pretermination hearing. Only when Hoesterey's employment was actually terminated, on his last day of work, did he know that he would receive no written notice or pretermination hearing. Accordingly, the district court erred in dismissing Hoesterey's section 1983 claim on statute of limitations grounds.

REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
DEC -2 1991
Cathy A. Catterson, Clerk
U.S. Court of Appeals

PAUL R. HOESTEREY,
Plaintiff-Appellant,

v.

THE CITY OF CATHEDRAL CITY;
JACK R. SMITH,
Defendants-Appellees.

No. 90-55141
D.C. No. CV-87-8672-RSWL
ORDER

Before: FLETCHER and CANBY, Circuit Judges, and McNICHOLS,** District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

** Honorable Robert J. McNichols, Chief United States District Judge for the Eastern District of Washington, sitting by designation.

APPENDIX C

FILED
DEC 11 1989
Clerk, U.S. District Court
Central District of California
By Deputy

ENTERED
Clerk, U.S. District Court
DEC 13 1989
Central District of California
By Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL R. HOESTEREY,
Plaintiff,

v.

THE CITY OF CATHEDRAL CITY, et al.,
Defendants.

NO. CV 87-8672-RSWL
ORDER

This action has been remanded by the Ninth Circuit for consideration and determination of whether the statute of limitations began to run when plaintiff was notified that he was to be discharged or when defendants failed to provide a hearing.

On defendants' motion to dismiss, this Court decided the issue of whether the statute of limitations began to run when plaintiff was notified that he was going to be discharged, when the Severance Agreement memorializing

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

the discharge was executed, or on the effective date of the discharge stated in the Severance Agreement. The Court ruled that the statute of limitations began to run when plaintiff was notified that he was going to be discharged. However, as the Ninth Circuit pointed out, this Court did not expressly consider whether the statute of limitations began to run when defendants failed to provide plaintiff with a hearing. Pursuant to the Ninth Circuit's remand order, this Court does so now.

When plaintiff was notified that he was going to be discharged, it was clear that he was going to be discharged without any further review or consideration, i.e. plaintiff was impliedly notified that he was going to be discharged without a hearing. Thus, plaintiff was effectively denied a hearing at the time he was told that he was going to be discharged, and the statute of limitations began to run at that time. Accordingly, the dismissal of this action was proper.

IT IS SO ORDERED.

Dated: December 11, 1989.

/s/ Ronald S.W. Lew
RONALD S.W. LEW
Untied States District Judge

Hoesterey v. Cathedral City, CV-87-8672-RSWL
Order on remand from Ninth Circuit.
#hoestere.

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

APPENDIX D

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUL 14 1989
Cathy A. Catterson, Clerk
U.S. Court of Appeals

PAUL R. HOESTEREY,
Plaintiff-Appellant,

v.

THE CITY OF CATHEDRAL CITY, et. al.
Defendants-Appellees.

No. 88-5975
D.C. No. CV-87-8672-RSWL
ORDER

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted May 5, 1989
Pasadena, California

Before: Sneed, Reinhardt, and Brunetti, Circuit Judges

Appellant alleged in his complaint that he had been denied procedural due process by the appellees. He claims that as a nonprobationary employee, he was entitled to a pretermination hearing. Apparently, such a hearing could take place anytime prior to the date when

appellant was actually discharged. However, the district court did not consider whether the statute of limitations began to run when appellant was notified that he was to be discharged or when appellees failed to provide a hearing. Accordingly, we remand the case to the district court for consideration of this issue.[1/]

REMANDED

[1/]At oral argument, the appellant contended that as a result of the Supreme Court's decision in *Owens v. Okure*, 109 S.Ct. 573 (1989), the applicable statute of limitations for a Section 1983 claim under the California Code of Civil Procedure is now 4 years, rather than the previously established one year. *See, e.g., Donoghue v. Count* [sic] *of Orange*, 828 F.2d 1432, 1436 (9th Cir. 1987). This contention is without merit. *Del Percio v. Thomsley*, No. 88-5753, slip. op. at 6190 (9th Cir. June 9, 1989).

APPENDIX E

LODGED
Clerk, U.S. District Court
MAR 15 1988
Central District of California
By Deputy

FILED
MAR 25 1988
Clerk, U.S. District Court
Central District of California
By Deputy

ENTERED
Clerk, U.S. District Court
MAR 28 1988
Central District of California
By Deputy

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City of Cathedral City and Jack R. Smith

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL R. HOESTEREY,
Plaintiff,

v.

THE CITY OF CATHEDRAL CITY, JACK R. SMITH AND DOES 1 through X, inclusive,
Defendants.

CASE NO. 8707672RSWL(Bx)
ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FEDERAL CLAIMS AND REMANDING THE CALIFORNIA CONSTITUTIONAL CLAIMS TO THE RIVERSIDE SUPERIOR COURT

DATE: March 7, 1988
TIME: 9:00 A.M.
DEPT: D

Defendants' Motion to Dismiss came before the Honorable Ronald S.W. Lew, Judge of the above-entitled Court, on March 7, 1988. Defendants having given notice of said Motion to Plaintiff, and the Court having reviewed and considered the papers and oral argument in support of and in opposition to the Motion, and good cause appearing therefore,

IT IS HEREBY ORDERED that Plaintiff's causes of action for violation of federal constitutional rights under 42 U.S.C. Section 1983 are dismissed with prejudice. The Clerk of the Court is hereby ordered to remand Plaintiff's claims for violation of the California Constitution to the Superior Court of the State of California, in and for the County of Riverside.

Dated:

Ronald S.W. Lew
Judge of the United States
District Court

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

APPENDIX F

EXCERPTS FROM COMPLAINT
HOESTEREY V.
THE CITY OF CATHEDRAL CITY, ET AL.
SUPERIOR COURT
OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF RIVERSIDE
CASE NO. INDIO 52029, FILED NOVEMBER 30, 1987

Paragraph 1 - First Cause of Action

1. This action is brought pursuant to Section 1982, Title 42 of the United States Code to redress the deprivation of a constitutionally protected right without due process of law.

Paragraph 15 - First Cause of Action

15. In or about January, 1985, defendant Smith and the City Manager for the City of Cathedral City, orally informed plaintiff that plaintiff would have to resign his position as Assistant City Manager. The only reason defendant Smith gave plaintiff for the proposed termination was that it was time for plaintiff "to spread your wings and fly for the good of your career." Further, defendant Smith stated that he did not need an Assistant City Manager and would abolish the position after plaintiff left.

Paragraph 17 - First Cause of Action

17. In or about January, 1986, defendant Smith began to pressure plaintiff to speed up his departure from his position as Assistant City Manager of Cathedral City. In or about October, 1986, defendant Smith told plaintiff

that by December 1, 1986, plaintiff had better have another job because plaintiff could not continue as Assistant City Manager beyond that date. However, in order to oblige plaintiff, defendant Smith promised plaintiff that if plaintiff did not have another job by December 1, 1986, defendant, City of Cathedral City would help plaintiff by hiring plaintiff as a consultant while plaintiff was looking for another job.

Paragraph 18 - First Cause of Action

18. In or about November, 1986, plaintiff repeatedly requested defendant Smith to provide plaintiff with proper written notice of termination. However, defendant Smith repeatedly refused to comply with plaintiff's request for proper written notice of termination.

Paragraph 19 - First Cause of Action

19. On or about the latter part of November, 1986, plaintiff persisted in his demands for something in writing to document his departure in order to protect his professional reputation. In addition, plaintiff wanted to document defendant Smith's oral promise of a contractual agreement for consulting services. Defendant Smith again refused to provide any written documentation. Plaintiff then prepared and presented to defendant Smith for his signature (1) a draft of a written severance agreement; and (2) a draft of an agreement whereby defendant Cathedral City would agree to retain the services of plaintiff on a contractual basis. When plaintiff presented the two proposed agreements to defendant Smith, defendant Smith refused to sign the agreement retaining plaintiff as an independent consultant. However, defendant Smith revised and signed the severance agreement which included a provision whereby the City of

Cathedral City would employ plaintiff on a part time basis at a rate of $2,500 per month for a minimum period of sixty (60) days with possible extensions. A true and correct copy of the Severance Agreement is attached hereto as Exhibit B.

Paragraph 20 - First Cause of Action

20. On or about November 30, 1986, defendant Smith, acting in part within the course and scope of his employment and in part serving a purpose of his own, terminated plaintiff from his position as Assistant City Manager. Defendant Smith represented to plaintiff that defendant Smith had advised the City Council of defendant City of Cathedral City of his actions. After the expiration of the two month period, plaintiff had not been able to find a comparable position. Plaintiff then requested defendant Smith to extend the term of the consulting agreement, however, defendant Smith refused to comply with the plaintiff's request.

Paragraph 27 - First Cause of Action

27. Plaintiff had a property right in the continuation of his employment with defendant City of Cathedral City.

Paragraph 28 - First Cause of Action

28. The dismissal of plaintiff was not for just cause. Defendants' actions and conduct described above, constitute an arbitrary deprivation and capricious disregard of plaintiff's right to property in violation of the substantive due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution and of article I, sections 7 and 15 of the California Constitution.

Paragraph 34 - Second Cause of Action

34. Defendants arbitrarily and capriciously terminated plaintiff without a pretermination hearing of any kind and without an adequate post termination hearing.

Paragraph 36 - Second Cause of Action

36. The actions and conduct described above, deprived plaintiff of his rights to property in violation of the procedural due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution and of article I, sections 7 and 15 of the California Constitution.

SEVERANCE AGREEMENT
EXHIBIT "B" ATTACHED TO
COMPLAINT
HOESTEREY V.
THE CITY OF CATHEDRAL CITY, ET AL.
SUPERIOR COURT
OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF RIVERSIDE
CASE NO. INDIO 52029, FILED NOVEMBER 30, 1987

This Agreement is made and entered into on the date noted below, by and between Paul R. Hoesterey, hereinafter referred to as "Employee", and Jack R. Smith, hereinafter referred to as "Employer", representing the City of Cathedral City, hereinafter referred to as "City".

WHEREAS, Employee was hired as an Administrative Assistant in July 1982; and

WHEREAS, at the time of hiring Employer asked for a two-year commitment from Employee; and

WHEREAS, for purposes of professional advancement Employer offered, at time of hiring, a promotion after two years to the title of Assistant City Manager, contingent upon Employee's intent to leave the City; and

WHEREAS, Employee has diligently sought employment at a comparable or higher position with other California cities for the past two years; and

WHEREAS, Employee has failed to secure employment during that period; and

WHEREAS, Employer has consistently encouraged Employee to find employment elsewhere; and

WHEREAS, Employer instructed Employee in early October to vacate Employee's position with City by the end of November, 1986; and

WHEREAS, Employer has confirmed that this action in no way reflects upon the professional abilities, performance, past actions, capabilities, moral character, or management philosophy of Employee, but is taken by Employer in order to activate the original conditions and commitments of employment;

NOW THEREFORE, it is agreed as follows:

1. Employee's position with City is terminated effective November 30, 1986.

2. Employer, on behalf of City, has committed to execute a mutual agreement with Employee for a minimum of sixty days, with possible extensions, for part-time employment, paid at rate of $2500.00 per month.

3. Said agreement will become effective December 1, 1986.

4. City will continue to provide, at its cost, existing health and life insurance benefits to Employee during the term of said agreement, and any subsequent extensions of same.

5. City will continue to contribute to Employee's PERS account, at the present rate, during the term of said agreement, and any subsequent extensions.

6. City will remit cash payment of Employee's accrued vacation and compensatory time, at current rate minus taxes then due, at employee's request sometime after January 1, 1987.

IN WITNESS WHEROF, [sic] the parties hereto have executed this agreement on the date set forth by their signatures.

/s/ Jack R. Smith — 11/28/86
Jack R. Smith — Date

/s/ Paul R. Hoesterey — 11/28/86
Paul R. Hoesterey — Date

FILED
APR 28 1992
OFFICE OF THE CLERK

(2)

No. 91-1387

In The

Supreme Court of the United States

October Term, 1991

THE CITY OF CATHEDRAL CITY; JACK R. SMITH,

Petitioners,

vs.

PAUL R. HOESTEREY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review a decision regarding the time when a cause of action accrues for denial of procedural due process in violation of 42 U.S.C. § 1983 where the decision was reached primarily on the particular factual circumstances of the case and no conflict among the circuits exists?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Citations ii

Statement of the Case 1

Reasons for Denying the Writ 7

I. The decision of the lower court followed Supreme Court precedent but the result differed by reason of the underlying facts. Thus, the question presented for review is primarily factual and presents neither a special nor important issue for review. 7

II. There is no conflict among the circuits. 11

Conclusion 14

TABLE OF CITATIONS

Cases Cited:

Arnett v. Kennedy, 416 U.S. 134 (1974) 13

Chardon v. Fernandez, 454 U.S. 454 (1981).....7, 8, 11

Cleveland Board of Education v. Loudermill, 470 U.S. 532 13

Contents

Page

Conley v. Gibson, 355 U.S. 41 (1957) 6, 10

Delaware State College v. Ricks, 449 U.S. 250 (1981) 7, 8, 9, 11

Garland v. Shapiro, 579 F. Supp. 858 (E.D. Mich. 1984) 14

Holden v. Commission Against Discrimination, 671 F.2d 30 (1st Cir. 1982), cert. denied, 459 U.S. 843 (1982) ..11, 12

Kessler v. Board of Regents, 738 F.2d 751 (6th Cir. 1984) 12, 13

Rubin v. O'Koren, 644 F.2d 1023 (5th Cir. 1981), upon rehearing of 621 F.2d 114; 738 F.2d 751 (1984) 13

Statutes Cited:

42 U.S.C. § 1981 7

42 U.S.C. § 1983 i

42 U.S.C. § 2000, et seq. 7

APPENDIX

Appendix A — Excerpts from Complaint *Hoesterey v. The City of Cathedral City, et al.*, from the Superior Court of the State of California in and for the County of Riverside, Case No. Indio 52029, Filed November 30, 1987 ..... 1a

No. 91-1387

In The

Supreme Court of the United States

October Term, 1991

THE CITY OF CATHEDRAL CITY; JACK R. SMITH

Petitioners,

vs.

PAUL R. HOESTEREY,

Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The petition contains perceived misstatements of fact and law. Therefore, respondent sets forth the following statement of the case to correct the misstatements of fact. The misstatements of law will be addressed in the reasons why the petition should be denied.

Respondent, Hoesterey, was the Assistant City Manager of petitioner, City of Cathedral City. (Opp. App. 1a, ¶12). According to City's Personnel Rules, which were adopted as a City Ordinance, Hoesterey was a nonprobationary employee. (Opp. App. 1a, ¶11). Because he had a vested property interest in his employment, Hoesterey could not be terminated without cause. (Opp. App. 1a ¶10, and Complaint Ex. A, Personnel Rules, p. 2, ¶III[1] and p. 3, ¶VI[6] Pet. App.). According to the due process safeguards found in the Constitution, if the City wanted to terminate him, it would have been required to provide Hoesterey with reasons for the termination and an opportunity to be heard.

For his own personal reasons, the City Manager of Cathedral City, petitioner Smith, wanted to discharge Hoesterey as early as 1985. However, since there was a lack of cause to justify a termination, the City Manager began employing manipulative tactics in an effort to induce and coerce Hoesterey to voluntarily submit his resignation. In January, 1985, the City Manager told Hoesterey that he no longer needed an Assistant City Manager. Moreover, the City Manager misrepresented the truth by telling Hoesterey that the position of Assistant City Manager was going to be abolished. To further induce a resignation, the City Manager told Hoesterey that it was time to "spread your wings and fly for the good of your career." (Pet. App. F1, ¶15).

Petitioners misrepresented the facts to this Court in the second paragraph of page 11 of their petition wherein they state that "Paragraph 15 of the Complaint alleges that Hoesterey was told as early as January, 1985, that he would be discharged without any opportunity to respond to charges, since the only reason for the discharge was that it was time for him "to spread [his] wings and fly for the good of [his] career." To the contrary, Paragraph 15 contains the reference to a discharge without an opportunity to be heard. (Pet. App. F1, ¶15). Paragraph 16 of the complaint refers to the City Managers statements as a "Proposed

Termination." (Opp. App. 2a, ¶16).

One year later in January, 1986, the City Manager again started to pressure Hoesterey for a resignation and requested that it be submitted by June, 1986. Hoesterey failed to submit his resignation. Continuing his efforts to induce a voluntary resignation, the City Manager, in late October, 1986, told Hoesterey that he better have another job by December 1, 1986 because Hoesterey could not continue in his position beyond that date. (Pet. App. F1, ¶17).

Petitioners, in their statement of the case, state that Hoesterey's complaint alleges that the October, 1986, oral statement by the City Manager to Hoesterey was a summary termination and constituted notice that the employment would terminate effective November 30, 1986 (Petition, p. 3-4). To the contrary, no such allegation of a summary termination can be found in Hoesterey's complaint.

Petitioners have taken a single paragraph out of context to form a pretext. The oral statement by the City Manager to Hoesterey in October, 1986 was clearly intended to mean that since Hoesterey could not be terminated without cause, and since Hoesterey failed to submit his resignation after the exertion of the earlier pressures brought about by the City Manager, the City Manager was increasing the pressure by stating that unless Hoesterey in fact resigned by December 1, 1986, he would be unlawfully terminated. (Pet. App. F1, ¶¶15 & 17).

It is important to emphasize the City Manager had no legal authority to discharge Hoesterey without cause. Therefore, in a final effort to avoid an unlawful termination, the City Manager threatened that if the resignation was not forthcoming within the allotted time, Hoesterey would be wrongfully discharged regardless of the legal consequences. (Pet. App. F1, ¶¶15 & 17). Further,

the City Manager expressly or impliedly threatened that if Hoesterey did not voluntarily resign, the City Manager would ensure that Hoesterey did not receive a favorable employment recommendation. (Pet. App. F1, ¶17 & Opp. App. 2a, ¶21).

More importantly, the facts set forth in the complaint do not indicate nor imply, as the petition states on p. 4, that the oral statements by the City Manager in October, 1986 had any finality to the decision. The oral statements were essentially conditional upon whether Hoesterey refused to voluntarily submitt his resignation by December 1, 1991.

Because the October, 1986 threat appeared to be more serious than the previous ones by reason of the close proximity and definiteness of the decision date, Hoesterey prepared a draft of a Severence Agreement that he had hoped would prevent the City Manager from destroying his career by providing unfavorable employment recommendations to future employers. In or about November, 1986, Hoesterey attempted to obtain the City Manager's signature on the agreement. (Pet. App. F2, ¶19).

The Severance Agreement was excecuted on Friday, November 28, 1986, the day after Thanksgiving when all City offices were closed. (Pet. App. F7). Hoesterey refused to resign until the City Manager at least signed the Hoesterey prepared Severance Agreement. After making numerous changes, the City Manager executed the document which effectively terminated Hoesterey's employment as of November 30, 1986. (Pet. App. F2, ¶19 & F6, ¶1).

In or about April, 1987, approximately four months after the effective date of termination, Hoesterey discovered that his job in fact had not been eliminated as had been previously represented by the City Manager. The falsity of the City Manager's representations were discovered by Hoesterey when applications

for the positon were being solicited by the City Manager. (Opp. App. 2a, ¶22 & 3a, ¶23).

It is significant to note that the City functioned under an unconstitutional City ordinance. Enacted by the City Council, the Personnel Rules did not require the City to provide written notice to an employee prior to discharge. Nor did the City ordinance require City to provide a due process hearing for nonprobationary employees. Instead the ordinance merely provided that a discharged employee could obtain a hearing by appealing the City Manager's written order of dismissal. But the City Manager was not required to provide the written notice. (Opp. App. 3a, ¶24).

Nonetheless, Hoesterey filed an appeal for a hearing with the City Council on October 10, 1987 after unsuccessfully attempting to win back his job by submitting an application when applications were solicited. The City Council refused to grant Hoesterey's request for a hearing and notified Hoesterey of its decision on October 28, 1987. (Opp. App. 3a, ¶26).

If Hoesterey's cause of action accrued on or after November 28, 1986, the complaint was timely filed on November 30, 1987. This is so because November 28, 1987 fell on a Saturday thus rendering timely the filing on the following Monday, November 30, 1987. (Judicial Notice).

The petitioners' statement of the case properly describes the procedural route in the lower courts up to the present time except for the needed clarification which follows in the next few paragraphs.

The question raised by Hoesterey before the Ninth Circuit was whether the period of limitations for denial of a due process hearing in the employment context commenced on (a) the date

of the initial notice of taking, (b) the last day of employment, or (c) the taking became final.

Upon appeal from the district court, the Ninth Circuit reversed the lower courts decision to dismiss the complaint. The appellate court, citing *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957) based its review on the contents of the complaint, the allegations of which they accepted as true and construed in the light most favorable to Hoesterey. (Pet. App. A6).

Construing the allegations in the complaint in the light most favorable to Hoesterey, the Ninth Circuit panel held that there was insufficient indication that the "termination decision" in October, 1986, was final and would be accompanied by no further process. The court stated, "Nothing in the complaint suggests that Hoesterey was informed or should otherwise have known that he would receive neither such notification nor a pretermination hearing. Only when Hoesterey's employment was actually terminated, on his last day of work, did he know that he would receive no written notice or pretermination hearing." (Pet. App. A9).

Accordingly, the Ninth Circuit reversed the district court on the basis of the underlying facts.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE LOWER COURT FOLLOWED SUPREME COURT PRECEDENT BUT THE RESULT DIFFERED BY REASON OF THE UNDERLYING FACTS. THUS, THE QUESTION PRESENTED FOR REVIEW IS PRIMARILY FACTUAL AND PRESENTS NEITHER A SPECIAL NOR IMPORTANT ISSUE FOR REVIEW.

The decision of the lower court is entirely consistent with the Supreme Court cases cited by petitioners. Petitioners argue that the decision of the court below which held that the limitations period commenced on the last day of employment, is as a matter of law contrary to the decisions rendered by this Court in *Delaware State College v. Ricks,* 449 U.S. 250 (1981), and *Chardon v. Fernandez,* 454 U.S. 454 (1981). We disagree and contend that the lower court decision is entirely consistent with these cases. Although a contrary result was reached, it was only because of a difference in the underlying facts.

At the outset, it should be noted that there is a significant difference between the case at bar and *Ricks* in that the latter did not involve a permanent employee entitled to due process. Ricks was a *nontenured* college professor who had no right to continue in his job. Prior to the end of his employment contract, Ricks was notified that he was being denied tenure. On the date that Ricks was formally notified that tenure would be denied, he was offered a "terminal contract" which allowed him to continue to teach for an additional year in a nontenured capacity. Ricks, a black Liberian, challenged his denial of tenure by the college as a discriminatory act in violation of 42 U.S.C. § 1981 and 42 U.S.C. § 2000, *et seq.*

The issue before the *Ricks* Court was whether the period of limitations commenced when Ricks was formally notified of the denial of tenure or at the end of his terminal contract. Ricks alleged that he was discriminated against when tenure was denied. *No further unlawful acts were alleged to have ocurred subsequent to the communication of the formal decision to deny tenure.*

In order to resolve the issue, the *Ricks* Court first sought to identify the unlawful employment practice. The only unlawful employment practice complained of was the denial of tenure. Thus, it was the denial of tenure that constituted the alleged discrimination. The Court, therefore, held that the period of limitations for an action based on discrimination for denial of tenure accrued when the decision became final and was communicated to Ricks.

Ricks is entirely consistent with the case at bar. The University made a formal decision to deny tenure and this decision was final and unequivocal. Consequently, the cause of action had its inception the moment that final decision was communicated to Ricks. Therefore, the Court was correct in holding that the end of the terminal contract had no legal significance with respect to the commencement of the statute of limitations unless there was a continuing violation. In the instant case, there was a constructive discharge and the termination did not become final until the last day of employement.

Chardon v. Fernandez, supra, involved a case similar to *Ricks.* Like Ricks, Fernandez was also a nontenured employee who claimed he was discriminated against by the denial of tenure. The issue was whether the limitations period should commence when the denial of tenure was communicated to Fernandez or on the last day of employment. Although Fernandez argued that he was discriminated against, he attempted to distinguish his case from *Ricks* by alleging that the unlawful employment practice was the

termination of employment rather than the earlier date when he was formally notified that tenure was denied.

The Fernandez Court looked beyond the allegations and found the case indistinguishable from *Ricks*. Dissecting the facts, the Court isolated the denial of tenure as the unlawful employment practice. In other words, the alleged discrimination took place, if at all, the moment Fernandez was notified of the denial of tenure. The subsequent termination of employment had no legal significance in terms of the underlying cause of action as the cause of action had already matured. Consequently, the Court held that the statute of limitations began when the formal decision was final and communicated to Fernandez rather than the last day of employment. 454 U.S. at 8.

In the case at bar, the lower court held that there was neither a formal nor final decision to terminate prior to November 28, 1986. Nor can it be said that the oral statements made by the City Manager to Hoesterey in October, 1986, either expressly or impliedly constituted a *final and unequivocal decision* to terminate. Nor do the facts indicate or even suggest that as of October, 1986, Hoesterey would be deprived of a due process hearing if he were terminated.

This case involves a constructive discharge. Thus, an oral statement at the whim of the City Manager which was part of a series of theretofore unsuccessful attempts to induce a resignation can hardly be classified as a formal and final decision. A reasonable person would think that a statement to be considered formal and final should at least be in writing. Moreover, for the statute of limitations on the denial of the due process hearing to commence on or about October, 1986, the written notice should contain an unequivocal statement that Hoesterey would not have an opportunity to be heard on his discharge.

None of these factors are present in this case. Instead, the October, 1986 statement made by the City Manager to Hoesterey was in substance conditional. The City Manager knew that he lacked the legal authority to discharge Hoesterey without cause. Therefore, the October, 1986 statement was nothing more than another attempt to elicit a resignation from Hoesterey. The statement could only have been reasonably interpreted to mean that either Hoesterey voluntarily resign by the designated date or the City Manager would unlawfully discharge him. We do not acutally know what the City Manager would have done had Hoesterey decided not to resign.

The point is that there was neither formality nor finality to the City Manager's oral statement. Nor was there any unequivocal statement that Hoesterey would nòt receive an opportunity to be heard if he did not resign. The understanding of a reasonable person in such a case would be that unless and until there was a discharge, there would be no right to a hearing.

In fact the actual discharge did not take place until at least November 28, 1986 when the City Manager successfully coerced Hoesterey to resign. It was on that date that the Severance Agreement was negotiated and executed. This was when the decision to terminate actually became final. Therefore, based on the facts of the case at bar, the decision of the Ninth Circuit was correct in holding that there was no final termination in October, 1986.

This Court has held that "a complaint cannot be dismissed for failure to state a claim *unless it appears beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, *supra*, at 45-46. In the instant case, it cannot be said that Hoesterey can prove no set of facts beyond any doubt to support his claim. The opposite seems to be quite apparent. Moreover in a statute of

limitations question, unless the action is clearly barred by the allegations set forth in the complaint, it is improper for the court to decide the issue as it is a function reserved for the jury.

Cases where a party disagrees with the application of the facts to the law are neither special nor important enough to warrant a review by this Court. This Court should not grant the petition for writ of certiorari.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS.

Nor does the decision below conflict with any of the appellate decisions cited by petitioners. For example, in *Holden v. Commission Against Discrimination*, 671 F.2d 30 (1st Cir. 1982), *cert. denied*, 459 U.S. 843 (1982), the plaintiff received notice on May 3, 1973 that she would be discharged from her job effective on August 31, 1973. Holden filed a complaint with the Equal Employment Opportunity Commission and subsequently received a right to sue letter.

The question decided by the First Circuit was whether the six month statute of limitations commenced on (a) the date Holden was notified of the discharge; (b) the date Holden received her right to sue letter from the EEOC; or (c) the date on which the state agency employing her declined jurisdiction of Holden's complaint (*Holden, supra,* 34).

Relying on *Ricks, supra*, and *Chardon, supra*, the *Holden* court held that the date of the wrong is the date of the advance notice in section 1983 cases. Thus, the court held that the statute of limitations began on May 3, 1973, the date Holden was notified of the discharge.

There is no inconsistency in *Holden* and the case at bar. In *Holden* the notification of discharge was deemed final. Therefore, the limitations period began on the date of notification. In the instant case, the facts do not even remotely suggest that the October, 1986 notice was final and unequivocal. In a constructive discharge case, it is difficult to hold that the employee knows or has reason to know that the decision is final until the actual date when employment terminates. Thus, the cases can be distinguished on the facts.

In *Kessler v. Board of Regents*, 738 F.2d 751 (6th Cir. 1984), by contrast, the court confronted the time of accrual of a due process claim but the decision of the Sixth Circuit squarely supports the Ninth Circuit's decision, rather than conflicting with it. Thus, Kessler received notice of termination from her employer, the University of Tennessee, on August 29, 1980. On June 30, 1981, the Board of Regents notified her that it found no basis to reverse the decision of the Chancellor.

Numerous violations were alleged by Kessler in her suit that was filed on August 30, 1982. In applying the one year statute of limitations, the court held that all of the violations complained of occurred more than one year prior to the filing of the complaint.

Kessler also contended that she was deprived of a due process hearing after she was terminated. Kessler claimed that since she had a constitutionally protected right to her job and did not receive a pretermination hearing, she was entitled to a posttermination hearing. The court agreed that she was entitled to a posttermination hearing but held that the deprivation of her due process rights had occurred, not when the decision to terminate became final, but on a subsequent date (June 30, 1981) when the Board of Regents notified Kessler of its decision to uphold the Chancellor's final determination. Thus, the one year limitation period began on the subsequent date. Since more than one year had elapsed

between June 30, 1981 and August 30, 1982, the date her suit was filed, the court held that the cause of action for denial of a due process hearing was time barred.

Kessler is similar to the case at bar in that both parties alleged a violation of due process in that the employer failed to provide a hearing.

What commenced the cause of action in *Kessler* was the notification by the Board of Regents to Kessler that it was upholding the Chancellor's determination. In the case at bar, petitioners argue that Hoesterey received final notice of termination in October, 1986, and that Hoesterey should have known that petitioners were not going to provide him with a pretermination hearing. Alternatively, according to *Kessler*, Hoesterey's cause of action for denial of a posttermination hearing should not accrue until City denied his appeal for a hearing which was about ten months after the last day of employment. In either event, Hoesterey's complaint was timely filed.

Accepting petitioners' contention as correct for argument's sake, Hoesterey would have still been entitled to a posttermination hearing within a reasonable time after the taking. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546-548; and *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Kessler v. Board of Regents, supra*; and *Rubin v. O'Koren*, 644 F.2d 1023 (5th Cir. 1981), *upon rehearing of* 621 F.2d 114; 738 F.2d 751, 755 (1984).

Assuming the termination was final and unequivocal in late October, 1986, as opposed to the last day of employment, Hoesterey's cause of action for denial of a due process hearing could only be time barred if forty-six days after notice of termination is deemed an unreasonable time to provide Hoesterey with a posttermination hearing. (Hoesterey's complaint was filed one year and no more than fifteen days after the late October, 1986 oral notification.)

The only conflict cited by petitioners is the district court case of *Garland v. Shapiro,* 579 F. Supp. 858 (E.D. Mich. 1984); however, that is scarcely the sort of disagreement among the lower courts that warrants review by this Court at this time.

A conflict among the circuits does not exist and this Court should not grant the petition for certiorari.

CONCLUSION

The decision rendered in this case by the Ninth Circuit is totally in accord with the legal precedent established by this Court. Nor is there a conflict among the circuits on this issue as petitioners would like to believe. The plain fact is that the decision below is totally logical and consistent with all appellate cases that have addressed the issue. Should a true conflict develop at some time in the future, this Court may see fit to clarify the positions. At the present time, there does not appear to be such a need.

Accordingly, this case lacks the significance and importance to justify review by this Honorable Court.

Respectfully submitted,

RUSSELL L. DAVIS
Attorney for Respondent

APPENDIX A — EXCERPTS FROM COMPLAINT *HOESTEREY V. THE CITY OF CATHEDRAL CITY, ET AL.* FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF RIVERSIDE CASE NO. INDIO 52029, FILED NOVEMBER 30, 1987

Paragraph 10 — First Cause of Action

10. Under Article VII, Section 6 of the Personnel Rules of Defendant City of Cathedral City, the City Manager could only dismiss a "regular employee" of the City for just cause. (A true and correct copy of the Personnel Rules are attached hereto as Exhibit A, except the period required to become a Regular Employee was amended since plaintiff began employment to provide for a twelve (12) month probationary period as opposed to six (6) months.)

Paragraph 11 — First Cause of Action

11. Six (6) months after July 12, 1982, plaintiff completed his probationary period whereupon plaintiff became a Regular Employee and acquired a property right in the continuation of his employment.

Paragraph 12. — First Cause of Action

12. During the course of plaintiff's employment, plaintiff was an excellent worker with an outstanding record of dedication, loyal and efficient service and contribution to the goals of defendant City of Cathedral City as well as to plaintiff's immediate supervisor, defendant Smith. In or about July, 1983, approximately one year after plaintiff's starting date, defendant City of Cathedral City promoted plaintiff to the position of Assistant to the City Manager. In or about July, 1984, approximately one year after the first promotion, plaintiff was

Appendix A

again promoted to the position of Assistant City Manager.

Paragraph 16 — First Cause of Action

16. After being informed by defendant Smith of the proposed termination, plaintiff, though reluctant to leave, began looking for a position as Assistant City Manager or City Manager in various other towns.

Paragraph 21 — First Cause of Action

21. The discharge of the plaintiff from his position as Assistant City Manager was accompanied by an express or implied threat that defendant Smith would give plaintiff a favorable employment recommendation and cause plaintiff's personnel record to indicate resignation only if plaintiff did not protest the termination. Defendant Smith's actions and conduct constituted coercion, undue influence and duress thereby causing plaintiff to reluctantly accept the termination and seek a comparable position in public administration in another city.

Paragraph 22 — First Cause of Action

22. In or about April, 1987, defendants began soliciting applications for the position of Assistance City Manager. By letter dated May 11, 1987, plaintiff submitted his application for the position of Assistant City Manager. On May 14, 1987, the Secretary to defendant Smith, acknowledged plaintiff's interest in the position, informed plaintiff that the list was being narrowed to fourteen (14) finalists and advised plaintiff that "it is unlikely you will be invited as one of the finalist (sic);"

Appendix A

Paragraph 23 — First Cause of Action

23. In or about August, 1987, plaintiff discovered that defendant City of Cathedral City hired an Assistant City Manager as of July 27, 1987.

Paragraph 24 — First Cause of Action

24. Article VIII, Sections 1 & 2 of defendant City of Cathedral City's Personnel Rules (Exhibit A) allow a dismissed employee to file an appeal to the City Counsel within ten (10) days of receipt of a written order of dismissal from the City Manager.

Paragraph 26 — First Cause of Action

26. On October 10, 1987, plaintiff timely filed an appeal of his dismissal to the City Council. Even though the ten (10) day period for filing a notice never began to run because plaintiff never received a written order of dismissal from the defendant City of Cathedral City, the City Clerk of the defendant City of Cathedral City, on October 28, rejected plaintiff's appeal and refused to bring the matter before the City Council.

Paragraph 35 — Second Cause of Action

35. The provision for a post-termination hearing for dismissed employees as set forth in the Personnel Rules did not meet the minimum safeguards to satisfy the requirements of procedural due process as the plaintiff's termination was not preceded by (a) written notice of defendant's proposed action; (b) the reasons therefor, (c) a copy of the charges and materials upon which the defendant's actions were based; and (d) the right to respond either orally or in writing.